In the Supreme Court of the United States

October Term, 1977
No. 77-1629

Supreme Court, U. S.
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No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

On November 18, 1977, a panel of three justices of the Court of Appeal of the State of California, Second Appellate District, Division One, rendered an opinion in Case 2d Crim. No. 27380 affirming petitioner's conviction in the Superior Court of the State of California for the County of Los Angeles, for the felony of violation of California Penal Code section 182, subdivision 1, conspiracy to commit the following misdemeanors: placing an

advertisement soliciting children for adoption, a violation of Civil Code section 224p; placing children for adoption without holding a license issued by the California Department of Health, a violation of Civil Code section 224q; operating a community health care facility and home-finding agency without having obtained a license from the California Department of Health, a violation of Health and Safety Code sections 1310, 1350, 1508, and 1540; and offering to pay money and paying money to a parent for the placement of their child for adoption, a violation of Penal Code section 273, subdivision a.[1] The opinion of the Court of Appeal was ordered unpublished. A copy of this opinion is included in Appendix A of the Appendix to Petition for Writ of Certiorari filed herein with this Honorable Court by petitioner. (*See also* CT 1-2, 49.)[2]

On February 16, 1978, the Supreme Court of the State of California denied petitioner's petition for a hearing without opinion. A copy of said denial is contained in Appendix B to petitioner's Appendix.

JURISDICTION

The ground for jurisdiction of this Honorable Court urged by petitioner appears in the petition, page 2.

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[1]Unless otherwise noted, all references to statutes herein are to statutes of the State of California.

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[2]The following abbreviations are used in the brief in reference to transcripts: CT — Clerk's Transcript; RT — Reporter's Transcript; SRT — Reporter's Transcript in *People v. Silverton,* Court of Appeal No. 2d Crim. 28211. Volumes 6, 7 and 8 of the Reporter's Transcript in *People v. Silverton* were made part of the record on appeal herein by order of the Court of Appeal filed January 17, 1977.

QUESTIONS PRESENTED

1. Was petitioner denied his constitutional rights to assistance of counsel and not to incriminate himself?

2. Was petitioner prosecuted under an ex post facto law or improperly punished under a law which had been repealed prior to the final disposition of the prosecution?

* * * *

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER MATERIALS INVOLVED IN THE CASE

Petitioner has set forth a portion of the constitutional provisions and statutes involved. (*See* Petn., pp. 5-6.) Respondent will herein cite the following additional pertinent constitutional provisions, statutes and other materials:

1. California Stats. 1972, ch. 1148, Art. 8, § 20, p. 2243.

2. California Stats. 1971, ch. 1593, part 1, ch. 1, § 103, p. 3238.

3. California Statutory Record, 1969-1972, Stats. 1972, p. 511.

4. California Constitution, Article IV, section 8.

5. California Constitution, Article XVIII, section 4.

6. California Statutory Record, 1969-1973, Stats. 1973, p. 537.

7. California Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3.

8. California Stats. 1973, ch. 1202, § 1.

9. Former California Health and Safety

Code section 1310.

10. Former California Health and Safety Code section 1250 (a) and (d).

11. California Health and Safety Code section 1508.

12. California Health and Safety Code section 1502.

13. California Health and Safety Code section 1540.

14. California Government Code section 9608.

Said pertinent constitutional provisions, statutes and other materials are set forth verbatim in Respondent's Appendix hereto.

STATEMENT OF THE CASE

Pursuant to a plea bargain petitioner pleaded guilty to count I of an indictment which charged him with the felony of conspiracy (Pen. Code § 182, subd. 1) to commit the following misdemeanors: placing an advertisement soliciting children for adoption (Civ. Code § 224p); placing children for adoption without a license issued by the California Department of Health (Civ. Code § 224q); operating a community health care facility and home-finding agency without having obtained a license from the California Department of Health (Health & Saf. Code §§ 1310, 1350, 1508, 1540); and offering to pay money and paying money to a parent for placement of their child for adoption (Pen. Code § 273, subd. a). As part of the plea bargain, it was agreed that the allegations in count I of the indictment charging appellant with conspiracy to commit various felonies would be deleted; that petitioner would be placed on probation for a period of time to be determined

by the trial court; that as a condition of probation petitioner could be sentenced to up to one year in county jail; that if petitioner violated his probation, he could be sent to state prison for the term prescribed by law for the crime to which he was pleading guilty; that his entering the guilty plea could result in his parole being revoked in a separate federal court case in which he had previously been sentenced; and that the prosecution would dismiss the remaining charges pending against him in the instant case, i.e., the charges set forth in counts VIII, IX, X and XIV of the indictment. (RT 72-78; CT 49.) After petitioner entered his guilty plea, the trial judge stated that if either side chose to call him as a witness in the then pending trial of codefendant Ronald Silverton, petitioner must cooperate in a reasonable and truthful manner with either side in the case. Petitioner stated that he would cooperate. The trial judge proceeded to continue petitioner's case for the probation and sentencing hearing. (RT 77-78; CT 49.)

Subsequent to entering his guilty plea but before petitioner was sentenced in the instant case, petitioner testified at the trial of codefendant Ronald Silverton. (*See* SRT 1630, et seq.; CT 50.)

Subsequent to his having testified at codefendant Silverton's trial, petitioner appeared in the trial court for the probation and sentencing hearing in the instant case. Proceedings were suspended and petitioner was granted probation for a period of three years on condition that he spend the first nine months in county jail. The judge recommended that petitioner be placed in a work furlough program. On motion of the People the remaining counts of the indictment in which petitioner was charged, i.e., counts VIII through X and XIV, were dismissed in the interest of justice. (CT 50.)

ARGUMENT

I.

PETITIONER'S CLAIM CONCERNING DENIAL OF HIS RIGHT TO ASSISTANCE OF COUNSEL AND INFRINGEMENT OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION IS MOOT

Petitioner contends that when he testified at the trial of codefendant Silverton, the trial judge should have advised him of his right to be represented by counsel and of his privilege against self-incrimination and that the judge deprived him of his right to counsel. Petitioner in essence asserts he should have been advised of his right to counsel and his privilege against self-incrimination and allowed to have his counsel present for the following reasons: (1) the judge who took petitioner's guilty plea and sentenced him in the instant case was the same judge who presided at codefendant Silverton's trial, and while petitioner was testifying at the Silverton trial, the judge made various comments to the effect that petitioner's testimony at the Silverton trial would adversely affect petitioner insofar as the judge's subsequent determination of the sentence to be imposed on petitioner in the instant case; (2) petitioner was still in jeopardy with respect to count I of the indictment, to which he had pleaded guilty, when he testified at codefendant Silverton's trial since he had not yet been sentenced on count I; and (3) by testifying at codefendant Silverton's trial, he was placed in a position of jeopardy with respect to those charges which were still pending in the instant case after he had pleaded guilty to count I of the indictment, i.e., the charges in counts VIII through X and XIV of the indictment. (Petn., pp. 2-4, 12-16.)

For the reasons set forth below, respondent submits petitioner's claim that while testifying at codefendant Silverton's trial he should have been advised of his right to be represented by counsel and his privilege against self-incrimination and was entitled to be represented by counsel is moot.

As part of the plea bargain pursuant to which petitioner pleaded guilty to the felony of conspiring to commit various misdemeanors as charged in count I of the indictment, it was agreed that petitioner would be placed on probation for a period of time to be determined by the trial court and that as a condition of probation petitioner could be sentenced to up to one year in county jail. (RT 75.) At petitioner's subsequent probation and sentencing hearing, proceedings were suspended and petitioner was granted probation for a period of three years on condition that he spend the first nine months in county jail. (RT 82; CT 50.) After petitioner had served eight and one half months of the aforementioned nine-month county jail term ordered by the trial judge as a condition of probation, and subsequent to the California Supreme Court's denial of petitioner's petition for hearing herein, the trial judge suspended the sentence and terminated petitioner's probation. (Appendix to Petition, pp. 53, 55, 57.)

Since the trial judge has suspended the jail sentence imposed on petitioner as a condition of probation and has also terminated petitioner's probation, petitioner obviously can no longer be further incarcerated, either in jail or in prison, on his conviction in the instant case. Therefore, since petitioner cannot spend any additional time in custody on his conviction herein, petitioner's claim that during his testimony at the trial of codefendant Silverton he should have been advised by the trial judge of his right to

counsel and privilege against self-incrimination and been represented by counsel is moot since the claim does not challenge the validity of petitioner's conviction but only his sentence. It simply no longer matters whether petitioner should have been advised by the judge and represented by counsel as he asserts, since even if he should, he cannot be prejudiced since he will serve no more time in custody in the instant case. Therefore petitoner's claim concerning his right to counsel and privilege against self-incrimination should be summarily dismissed. (*Ex Parte Baez* (1900) 177 U.S. 378, 387-390; *Wainwright v. Rewis* (5th Cir. 1973) 486 F.2d 306, 307; *Butts v. Wainwright* (5th Cir. 1968) 402 F.2d 834, 835.)

Respondent further notes that petitioner has failed to establish that he was prejudiced insofar as the sentence imposed on him herein by the trial judge because the judge did not advise him when he testified at codefendant Silverton's trial of his right to counsel and privilege against self-incrimination or because he was not represented by counsel at the Silverton trial.

While the trial judge did indicate during the course of petitioner's testimony at the Silverton trial that portions of petitioner's testimony could influence the judge's imposition of sentence in the instant case, this was stated in connection with the fact that at the Silverton trial petitioner disclaimed guilt in the instant case notwithstanding his admission of guilt when he had previously entered his guilty plea to count I of the indictment pursuant to the plea bargain. (SRT 1687-1690, 1715-1719, 1888-1889, 1896, 2001-2016A; *see* RT 72-75.) However, nothing in the record of petitioner's probation and sentencing hearing indicates that the trial judge was in fact influenced by the nature of petitoner's testimony at the Silverton trial to

impose a harsher sentence on petitioner than the judge would have imposed had petitioner not testified the way he did at the Silverton trial. (*See* RT 79-83.) On the contrary, at the probation and sentencing hearing, neither petitioner nor his counsel, Mr. Dobbs, in any way indicated that the trial judge was biased against petitioner by virtue of petitioner's testimony at the Silverton trial or would tend to impose a harsher sentence on petitioner because of said testimony. On the contrary, petitioner's counsel indicated there was no legal cause why sentence should not be pronounced at that time. (RT 79.)

In support of his position, petitioner points out that during the course of his testimony at codefendant Silverton's trial, the prosecutor asked the trial judge to counsel petitioner on the law of perjury and thereafter counsel for both parties approached the bench and the judge stated:

> "And it goes without saying that as far as Mr. Wilkes is concerned, if on one occasion he says, yes, he admits the truth of the charge and if on another occasion, he says, 'I admitted it but I'm really saying that I didn't do it,' that's up to him.
>
> "And that would certainly have some effect on the court's thinking processes as to what the defendant's state of mind is when I try to decide what would be appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1890-1891.)

Petitioner further notes that a short time later at the Silverton trial the prosecutor indicated he thought petitioner was perjuring himself and petitioner then asked if it would be advisable for him to have his attorney present in court and the judge responded, "I don't think so at this particular moment." (SRT 1893-1895.) The foregoing

colloquy concerning whether petitioner was perjuring himself, when viewed in context, did not indicate that the trial judge would impose a harsher sentence on petitioner because of the nature of his testimony. Actually, the judge stated that he did not think there was any big problem regarding perjury by petitioner since petitioner was not under oath when he made the statements (i.e., his guilty plea herein) as to which he was being questioned at the Silverton trial. (SRT 1891, 1895.) Since the judge felt petitioner was not perjuring himself, there manifestly was nothing improper in the judge advising petitioner, in response to petitioner's question, that it was unnecessary for petitioner to have his attorney present in court at that time.

Petitioner in additional support of his argument refers to several statements made during the course of his testimony at the Silverton trial by himself, the trial judge and counsel for both sides. (Petn., pp. 8-10.) However, nothing in any of these statements indicated bias on the part of the judge against petitioner in any manner, including the sentencing of petitioner in the present case.

Respondent further submits that the actual sentence imposed on petitioner by the trial judge clearly demonstrates petitioner was not prejudiced because the judge did not during codefendant Silverton's trial advise petitioner of his right to counsel and privilege against self-incrimination or tell him he should have counsel present. Petitioner was not prejudiced with respect to count I of the indictment since the trial judge's granting petitioner probation for three years on count I on condition that he spend the first nine months in county jail was within the terms of the plea bargain pursuant to which petitioner pleaded guilty to count I. (RT 72-78; CT 50.) Moreover, since counts VIII

through X and XIV of the indictment were dismissed at the probation and sentencing hearing herein, petitioner manifestly was not prejudiced with regard to those counts. (CT 50.)

Respondent finally submits the trial judge was not legally required to advise petitioner during his testimony at codefendant Silverton's trial of his right to counsel or privilege against self-incrimination or to allow petitioner to be represented by counsel.

The privilege against self-incrimination extends to answers that would in themselves support a conviction of a crime and also embraces answers which would furnish a link in the chain of evidence needed to prosecute the witness for a crime. However, the privilege against self-incrimination is confined to instances where a witness has reasonable cause to apprehend danger from a direct answer. A witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of self-incrimination. It is for the trial court to determine whether a witness' claim of self-incrimination is justified. (*Hoffman v. United States* (1951) 341 U.S. 479, 486.)

In the instant case, any testimony petitioner gave at the trial of codefendant Silverton would not support a conviction or furnish a link in the chain of evidence needed to prosecute petitioner in the instant case since prior to testifying at the Silverton trial, petitioner had pleaded guilty herein. Moreover, as demonstrated above by respondent, sentence was not imposed on petitioner by reason of any testimony he gave at the Silverton trial. Rather, sentence was imposed solely by reason of petitioner's prior voluntary plea of guilty to count I of the

indictment. Petitioner's guilty plea removed him from the protection against self-incrimination afforded by the Fifth Amendent to the United States Constitution. The plea of guilty was an admission of every element of the crime of conspiring to commit various misdemeanors as charged in count I of the indictment and petitioner was not subjected to any additional prosecutional penalty because of his testimony at the Silverton trial, as the record reflects that the remaining counts of the indictment charged against petitioner were properly dismissed at the probation and sentencing hearing, the sentence imposed was within the terms of the plea bargain entered into by petitioner, and there is no evidence the trial judge imposed a harsher sentence on petitioner than he would have had petitioner not given the testimony he did at codefendant Silverton's trial. (*People v. Stewart* (1969) 1 Cal. App.3d 339, 343, 81 Cal. Rptr. 562, 564-565.)

Since petitioner's testimony at the Silverton trial was not subject to his invocation of the privilege against self-incrimination, the trial judge had no duty to advise petitioner of the privilege or his right to representation by counsel or to allow petitioner to have his attorney present for the purpose of protecting petitioner against incriminating himself. However, even assuming, arguendo, that petitioner could properly have invoked his privilege against self-incrimination in regard to some of his testimony at the Silverton trial, petitioner in fact was aware of the privilege and his right to representation of counsel in view of the circumstance that while testifying at the Silverton trial, he asked the trial judge whether it would be advisable for him to have his attorney present in court. (SRT 1895.)[3] However, the trial judge, in his function as

[3]Petitioner actually had his attorney, Mr. Dobbs, present in court during at least a portion of his testimony in the Silverton trial. (SRT 1983-1984, 2016A-2019.)

the trier of fact on the matter, in essence determined that the privilege against self-incrimination did not apply to petitioner's testimony when he advised petitioner that it would not be necessary for petitioner to have his attorney present in court. (SRT 1895.)

In view of the foregoing, petitioner's claim concerning his privilege against self-incrimination and right to counsel at codefendant Silverton's trial is moot as well as without merit, and petitioner has shown no prejudice.

II.

PETITIONER WAS PROPERLY CONVICTED OF CONSPIRACY TO VIOLATE FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

Petitioner pleaded guilty as charged in count I of the indictment to the crime of conspiracy to commit the misdemeanors of violation of Civil Code sections 224p and 224q; violation of Health and Safety Code sections 1310, 1350, 1508 and 1540; and violation of Penal Code section 273, subdivision a. (CT 1-2, 49.)

Petitioner claims that the portion of his conviction for conspiracy to violate Health and Safety Code section 1310, a statute which has been repealed, under count I of the indictment constituted the unconstitutional application of an ex post facto law to him. Petitioner further claims that even if former Health and Safety Code section 1310 was not ex post facto as applied to him, then the repeal on January 1, 1974, of former section 1310 before petitioner's conviction herein had been reduced to final judgment on appeal requires reversal of his conviction for conspiracy to violate that section. (Petn., pp. 4-5, 16-19.)

For the reasons discussed below, respondent submits

petitioner was properly convicted and punished for violation of former Health and Safety Code section 1310.

In arguing that his conviction for conspiring to violate former Health and Safety Code section 1310 constituted application of an ex post facto law to him, petitioner relies on the following statement made by the California Court of Apeal in affirming petitioner's conviction under count I of the indictment:

> "The prosecution of appellant Wilkes for violation of former section 1310 of the Health and Safety Code (maintaining homefinding agency [placing children for adoption] without license) was commenced before the effective date of that section on January 1, 1974." (Petn., p. 17; *see* Appendix to Petition, p. 9.)

The foregoing statement by the Court of Appeal to the effect that prosecution of petitioner for conspiracy to violate former Health and Safety Code section 1310 was commenced before the "effective date" of that section on January 1, 1974, is erroneous. As petitioner correctly points out, the prosecution herein commenced on June 14, 1974, when the indictment charging petitioner was returned by the Grand Jury and filed in the trial court. (Petn., p. 6; CT 1-2.) Therefore, it is clear that the prosecution herein commenced well after January 1, 1974.

Petitioner further argues, however, that since former Health and Safety Code section 1310 only took effect on January 1, 1974, it was an ex post facto law as applied to him since count I of the indictment alleged that the conspiracy charged therein took place between July 1973 and June 11, 1974, and thus former section 1310 was not in effect during the portion of the conspiracy between the period July 1, 1973, through December 31, 1973. (Petn., p. 16; *see* CT 1-2.) However, a distinction must be drawn between the "effective date" and "operative date" of section 1310 as those terms are used in statutory interpretation. (*People v. Webb Bros.* (1934) 139 Cal. App. 334, 336, 34 P.2d 175, 176; 56 Ops. Cal. Atty. Gen. 176-180 (1973); *see also County of Los Angeles v. Lamb* (1882) 61 Cal. 196.) Therefore, with reference to the period of effective operation of former section 1310, it is necessary to examine the legislative history of the statute.

As amended on November 27, 1972, former section 1310 was part of Statutes 1972, chapter 1148, section 3, subchapter 2, article 4, page 2230. Section 20 of chapter 1148 provided that the foregoing provisions, including section 1310, "shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative." (Stats. 1972, ch. 1148, Art. 8, § 20, p. 2243.) Pursuant to Statutes 1971, chapter 1217, section 3.5, Reorganization Plan No. 1 of 1970[4] became operative on July 1, 1973. (*See* Statutory Record, 1969-1972, Stats. 1972, p. 511.) According to Article IV, section 8, subd. (a) of the California Constitution as it then applied, the "effective date" of these 1972 statutes, in contrast to their legislatively-prescribed "operative date," was sixty-one days after the final adjourment of the 1972 regular session or March 7, 1973.

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[4]The 1970 Reorganization Plan No. 1 provided for comprehensive executive reorganization by vesting the newly-formed State Department of Health with omnibus authority derived from the consolidation of various Human Relations agencies. (Stats. 1971, ch. 1593, part 1, ch. 1, § 103, p. 3238.) The authority for amended section 1310 of chapter 1148 was obviously related to the jurisdiction of the new State Department of Health. This explains why the operative date for the two sets of provisions were keyed to each other.

Thus, the effective date of the statutes enacted in the 1972 legislative session was not affected by the November 7, 1972, amendment to Article IV of the State Constitution which provided that all statutes, except those specified, would become effective on January 1 next following a 90-day period from the enactment date. This resulted from the distinction between an enactment's effective, as opposed to operative date; a distinction applicable to constitutional amendments as well as statutes. Amended Article IV, section 8(c) became effective on November 8, 1972 (Cal. Const., Art. XVIII, § 4), but it did not become operative until January 8, 1973, with the start of the 1973 session. The laws emanating from the 1973 session would be the first to have effective dates calendared according to the amended constitutional provision. (56 Ops. Cal. Atty. Gen., *supra,* at pp. 176-180 and authorities therein cited.)

The operative period of former Health and Safety Code section 1310 therefore commenced on July 1, 1973, and continued until the statute's repeal and re-enactment in amended form by Statutes 1973, chapter 1202, section 1 and chapter 1203, section 4, and section 1508 respectively. (*See* Statutory Record, 1969-1973, Stats. 1973, p. 537.) Since the provisions of the 1972 constitutional amendment to Article IV, section 8(c) (1) did apply to the 1973 enactment, and because there was no express operative date prescribed, new Health and Safety Code section 1508 became effective and operative on January 1, 1974. Former Health and Safety Code section 1310 was therefore operative and in effect from July 1, 1973 to December 31, 1973. Consequently, charging petitioner in count I of the indictment with conspiracy to violate former section 1310 during the period, inter alia, of July 1, 1973, through December 31, 1973, was a proper pleading and formed a valid basis for petitioner's conviction. Petitioner was not subjected to an ex post facto law or ex post facto

punishment.

There is also no merit to petitioner's additional claim that his conviction for conspiracy to violate former Health and Safety Code section 1310 was improper because that section was repealed on January 1, 1974, prior to petitioner's conviction becoming final on appeal.

In *People v. Rossi* (1976) 18 Cal.3d 295, 134 Cal. Rptr. 64, 555 P.2d 1313, relied on by petitioner (Petn., p. 18), it was held that when the Legislature repeals a criminal statute or otherwise removes the state's condemnation from conduct that was formerly deemed criminal, such action requires reversal of a criminal prosecution or conviction therefor which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.

Respondent submits the rule of *People v. Rossi, supra,* requiring dismissal of a pending criminal proceeding which has not yet reached final disposition when the Legislature repeals the criminal statute that was the subject of the violation charged in the proceeding is inapplicable to petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310 by virtue of the consecutive repeal and reenactment of the provisions of former section 1310 pertaining to homefinding agencies and the saving clause of California Government Code section 9608.

Unlike the facts which obtained in *People v. Rossi, supra,* the record of the consecutive legislative acts which repealed former Health and Safety Code section 1310 and simultaneously transferred its homefinding provisions to new Health and Safety Code section 1508 indicates no intent by the Legislature to either decriminalize unlicensed homefinding activities or mitigate the punishment

therefor. Rather, the Legislature unequivocally demonstrated an intent to maintain the sanctions for such unlawful activities.

An examination of the relevant legislative history indicates that in the course of codifying the new California Community Care Facilities Act (Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3), the provisions of former section 1310 pertaining to homefinding agencies were transferred to the new Act along with a duplication of the punishment provisions of former section 1350. For this reason, application of the theory of remission set forth in *People v. Rossi, supra,* to petitioner's conviction for conspiracy to violate, inter alia, former Health and Safety Code section 1310 would be incorrect.

As part of the consolidation of statutes into the new California Community Care Facilities Act, the homefinding provisions of former section 1310 were simultaneously repealed and then reenacted and transferred from Division 2, chapter 2, to Division 2, chapter 3, of the Health and Safety Code. (Stats. 1973, ch. 1202, § 1 and ch. 1203, subch. 3.)

Indeed, the sole changes in the substance of former section 1310 effected by the transfer of its homefinding provisions to new section 1508 were limited to minor changes to remove the age limit of persons who could be the objects of unlicensed homefinding activities and to include corporate associations within the range of proscription.[5] Violation of former section 1310 was punishable by a fine not exceeding $500 or by imprisonment in

[5]Former section 1310 provided in pertinent part:

> "No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter. . . . "

county jail for a period not to exceed 180 days or by both such fine and imprisonment pursuant to former section 1350. Pursuant to present section 1540, violation of section 1508 is punishable by the same penalty.

The legislation which repealed former section 1310 was thus tandem to that which incorporated its former provisions under new section 1508. (*See* fn. 5, *supra.)*

The concurrence between the repealing act and the act which transferred the homefinding provisions to the Community Care Facilities Act leads to the obvious conclusion that in order to preserve prosecutions for violation of former Health and Safety Code section 1310

Former section 1250(a) provided in relevant part:

> " 'Facility' means any hospital, institution, boarding home . . . homefinding agencies. . . ."

Former section 1250(d) provided:

> " 'Homefinding agencies' means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption."

Former section 1250 was repealed by the same comprehensive legislation that repealed former section 1310. (Stats. 1973, ch. 1202, § 1.)

Current section 1508 provides in pertinent part:

> "No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter."

Current section 1502 defines "community care facility" as including any facility, place or building which is maintained and operated to provide homefinding agencies for children, adults, or children and adults. Section 1502(c) specifically defines "homefinding agency" as "any individual or organization engaged in finding homes or other places of placement of persons of any age for temporary or permanent care or adoption."

instituted prior to the effective date of the statute's repeal on January 1, 1974, the Legislature acted in reliance on the general saving clause of Government Code section 9608. (*See People v. Kuhns* (1976) 61 Cal. App.3d 735, 760, 132 Cal. Rptr. 725, 740; 2A Sutherland, *Statutory Construction,* (4th ed. 1973) § 47.13, pp. 92-93.)

Even in the absence of the saving clause of Government Code section 9608, petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310 was proper under the holding of *In re Dapper* (1969) 71 Cal.2d 184, 77 Cal. Rptr. 897; 454 P.2d 905. Invalidating an argument essentially identical to that asserted by petitioner herein, the *Dapper* court stated:

> "It is well established that the rule which bars prosecution under a repealed law for offenses occuring before repeal does not apply 'where there is an outright repeal and a substantial reenactment,' because it will be presumed that the legislative body 'did not intend that there should be a remission of crimes not reduced to final judgment.' [Citation.] 'When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because obviously, in such event the intent of the Legislature is . . . not to affect the continuous operation of the law.'

> [Citations.]" (71 Cal.2d at p. 189.)[6]

There is no evidence whatsoever that the Legislature manifested any intent to either decriminalize unlicensed homefinding activities or mitigate the punishment therefor. Consequently, petitioner's conviction for conspiracy, inter alia, to violate former Health and Safety Code section 1310 is valid by virtue of that section's substantial reenactment in present Health and Safety Code section 1508.[7]

Even assuming, arguendo, that petitioner is correct in his claim that his conviction for conspiracy to violate former Health and Safety Code section 1310 was improper, repondent further submits that reversal of petitioner's conviction on count I of the indictment is not warranted. Petitioner pleaded guilty to the crime of conspiracy to commit seven misdemeanors, including former Health and Safety Code section 1310, as charged in count I; the allegations that petitioner conspired to

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[6] *See also* 77 A.L.R.2d 336, 347. It is stated therein:

> "The most obvious instance in which to apply the rule that a simultaneous repeal and re-enactment of a statute is not a true repeal but is a continuation of the original statute is the case in which the legislature revises and consolidates . . . statutes in a particular field, and purports to repeal all prior laws . . . in the particular field."

[7] In his Petition for Writ of Certiorari, petitioner cites and relies on the unpublished opinion of the California Court of Appeal, Second Appellate District, Division Four, in *People v. Silverton,* 2d Crim No. 28211. (Petn., pp. 10-11; Appendix to Petn., pp. 22-24.) Respondent submits petitioner's citation of and reliance upon the unpublished decision in the *Silverton* case is inappropriate and of no effect. An unpublished appellate court opinion is of no precedential effect. *(Heaton v. Marin County Employees Retirement Board* (1976) 63 Cal. App.3d 421, 431, 133 Cal. Rptr. 809, 814; *Powers v. Sissoev* (1974) 39 Cal. App.3d 865, 872 fn. 8, 114 Cal. Rptr. 868, 873.)

commit various felonies having been deleted from count I. (CT 49.) In the event that the portion of the plea admitting guilt to conspiring to violate former section 1310 is not valid, this would not render petitioner's entire guilty plea invalid. Rather, the plea of guilt as to conspiring to commit those six misdemeanors other than former Health and Safety Code section 1310 set forth in count I would still be valid and that portion of the plea as to conspiracy to violate former section 1310 would be severable. A plea of guilty amounts to an admission of every element of the crime charged and is the equivalent of a conviction. Nothing remains but to render judgment and determine punishment. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) Therefore, in the event this Honorable Court should determine to be improper the portion of petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310, it is submitted it would be appropriate to strike that portion of petitioner's guilty plea relating only to the admission to conspiring to violate former section 1310 and affirm the remainder of petitioner's conviction.

CONCLUSION

For the foregoing reasons, it is requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

CALIFORNIA STATS. 1972,
CH. 1148, ART. 8, SECTION 20, P. 2243.

This act shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative.

CALIFORNIA STATS. 1971, CH. 1593, PART 1, CH. 1, SECTION 103, P. 3328.

103. The State Department of Health succeeds to and is vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the Department of Mental Hygiene, the Department of Public Health, the Department of Health Care Services, the Department of Social Welfare, with respect to social service functions thereof, the Department of Rehabilitation, with respect to its alcoholism program, the Department of Consumer Affairs with respect to the healing arts boards and the State Board of Public Health, with respect to its powers to issue, amend, and revoke, rules and regulations and licenses or permits.

CALIFORNIA STATUTORY RECORD, 1969-1972, STATS. 1972, P. 511.

HEALTH AND SAFETY CODE — CONTINUED

Section	*Affected by* *Year*	*Chapter*	*Effect*
	1971	1744	Am
544	1971	1744	Ad
543	1971	1744	Ad
546	1971	1744	Ad
547	1971	1744	Ad
604	1971	1744	Ad
1101	1971	1593	Am. S[468]
1102	1971	1593	Am. S[468]
1110	1969	1263	Am
	1971	1593	Am. S[468]
1110.5	1971	1593	Am. S[468]
1111	1971	1593	Am. S[468]
1112	1971	1593	Am. S[468]
1130	1971	1593	Am. S[468]
1140	1971	1593	Am. S[468]
1153	1971	1593	Am. S[468]
1155	1971	1593	Am. S[468]
1156	1971	1593	Am. S[468]
1157	1971	1593	Am. S[468]
1170	1970	1187	Ad
	1972	1255	R.S*
1171	1970	1187	Ad
	1971	21	Am
	1972	1255	R.S*
1173	1970	1187	Ad
	1972	1255	R.S*
1175	1971	1781	Ad
1176	1971	1781	Ad

Section	Affected by Year	Chapter	Effect
1177	1971	1781	Ad
1178	1971	1781	Ad
1179	1971	1781	Ad
1180	1971	1781	Ad
1181	1971	1781	Ad
1182	1971	1781	Ad
1200.5	1970	635	Am
1203	1971	1120	Am
	1971	1593	Am S[468 468]
1204	1971	1593	Am. S[468]
1210	1971	1593	Am. S[468]
1213	1971	1593	Am. S[468]
1225	1972	1425	Ad
1229	1972	1148	Am[468]
1236	1971	1593	Am. S[468]
1237	1971	1593	Am. S[468]
1250	1972	1148	Ad[468]
1270	1972	1148	Ad[468]
1271	1972	1148	Ad[468]
1272	1972	1148	Ad[468]
1273	1972	1148	Ad[468]
1274	1972	1148	Ad[468]
1290	1972	1148	Ad[468]
1291	1972	1148	Ad[468]
1292	1972	1148	Ad[468]
1310	1972	1148	Ad[468]
1311	1972	1148	Ad[468]
1312	1972	1148	Ad[468]
1313	1972	1148	Ad[468]
1314	1972	1148	Ad[468]
1315	1972	1148	Ad[468]
1330	1972	1148	Ad[468]

Section	Affected by Year	Chapter	Effect
1331	1972	1148	Ad[468]
1332	1972	1148	Ad[468]
1333	1972	1148	Ad[468]
1334	1972	1148	Ad[468]
1335	1972	1148	Ad[468]
1336	1972	1148	Ad[468]
1338	1972	1148	Ad[468]
1339	1972	1148	Ad[468]
1340	1972	1148	Ad[468]
1341	1972	1148	Ad[468]
1342	1972	1148	Ad[468]
1342.5	1972	1148	Ad[468]
1343	1972	1148	Ad[468]
1344	1972	1148	Ad[468]
1345	1972	1148	Ad[468]
1346	1972	1148	Ad[468]
1347	1972	1148	Ad[468]
1348	1972	1148	Ad[468]
1348.5	1972	1148	Ad[468]
1350	1972	1148	Ad[468]
1351	1972	1148	Ad[468]
1352	1972	1148	Ad[468]
1353	1972	1148	Ad[468]
1354	1972	1148	Ad[468]
1370	1972	1148	Ad[468]
1371	1972	1148	Ad[468]
1372	1972	1148	Ad[468]
1373	1972	1148	Ad[468]
1374	1972	1148	Ad[468]
1390	1972	1148	Ad[468]
1391	1972	1148	Ad[468]
1392	1972	1148	Ad[468]

Section	Affected by Year	Chapter	Effect
1393 Div.2. Ch. 2. Art. 1 (heading)	1972	1148	Ad[468]
	1970	1111	Ad

*Effective immediately.
[82]Not operative.
[468]Operative on July 1, 1973.

CALIFORNIA CONSTITUTION, ARTICLE IV, SECTION 8

Prior to November 7, 1972, Article IV, section 8 of the California Constitution reads as follows:

"§ 8. Bills; procedure; effective date of statutes; urgency measures

Sec. 8. (a) At regular sessions no bill other than the budget bill may be heard or acted on by committee or either house until the 31st day after the bill is introduced unless the house dispenses with this requirement by rollcall vote entered in the journal, three fourths of the membership concurring.

(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.

(c) No statute may go into effect until the 61st day after adjournment of the regular session at which the bill was passed, or until the 91st day after adjournment of the special session at which the bill was passed, except statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes.

(d) Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring. An urgency statute may not create or abolish any office or change the salary, term, or duties of any office, or grant any franchise or special privilege or create any vested right or interest."

On November 7, 1972, Article IV, section 8 was amended by deletion of former subdivision c and addition of the following as new subdivision c:

"(c) (1) Except as provided in paragraph (2) of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed.

(2) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes shall go into effect immediately upon their enactment."

CALIFORNIA CONSTITUTION, ARTICLE XVIII, SECTION 4

Article XVIII, section 4 of the California Constitution pertaining to amendment and revision of the California Constitution by the state Legislature provides as follows:

"§4. Submission to electors; effective date; conflicting provisions

Sec. 4. A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."

CALIFORNIA STATUTORY RECORD, 1969-1973, STATS. 1973, P. 537.

HEALTH AND SAFETY CODE — CONTINUED

Section	Affected by Year	Chapter	Effect
1265.7	1973	1202	Ad
1265.8	1973	1202	Ad
1266	1973	1202	Ad
1267	1973	1202	Ad
1268	1973	1202	Ad
1269	1973	1202	Ad
1270	1972	1148	Ad
	1973	1202	R & Ad
1271	1972	1148	Ad
	1973	1202	R
1272	1972	1148	Ad
	1973	1202	R & Ad
1273	1972	1148	Ad
	1973	1202	R & Ad
1274	1972	1148	Ad
	1973	1202	R & Ad
1275	1973	142	Ad* [468]
	1973	1202	Ad
1276	1973	1202	Ad
1277	1973	1202	Ad
1278	1973	1202	Ad
1279	1973	1202	Ad
1280	1973	1202	Ad
1282	1973	1202	Ad
1290	1972	1148	Ad
	1973	1202	R & Ad
129!	1972	1148	Ad
	1973	1202	R & Ad

Section	Affected by Year	Chapter	Effect
1292	1972	1148	Ad
	1973	1202	R & Ad
1293	1973	1202	Ad
1294	1973	1202	Ad
1295	1973	1202	Ad
1296	1973	1202	Ad
1297	1973	1202	Ad
1298	1973	1202	Ad
1300	1973	1202	Ad
1305	1973	1202	Ad
1306	1973	1202	Ad
1307	1973	1202	Ad
1308	1973	1202	Ad
1310	1972	1148	Ad
	1973	1202	R
1311	1972	1148	Ad
	1973	1202	R
1312	1972	1148	Ad
	1973	1202	R
	1973	1203	Am[82]
1313	1972	1148	Ad
	1973	1202	R
1314	1972	1148	Ad
	1973	1202	R
1315	1972	1148	Ad
	1973	1202	R & Ad
1316	1973	1202	Ad
1317	1973	1202	Ad
1318	1973	1202	Ad
1330	1972	1148	Ad
	1973	1202	R

Section	Affected by Year	Chapter	Effect
1331	1972	1148	Ad
	1973	1202	R
1331.1	1973	1181	Ad*
	1973	1202	R
1332	1972	1148	Ad
	1973	1202	R
1333	1972	1148	Ad
	1973	1202	R
1334	1972	1148	Ad
	1973	1202	R
1335	1972	1148	Ad
	1973	1202	R
1336	1972	1148	Ad
	1973	1102	Am*
	1973	1202	R
1338	1972	1148	Ad
	1973	1202	R
1339	1972	1148	Ad
	1973	1202	R
1340	1972	1148	Ad
	1973	1202	R
1341	1972	1148	Ad
	1973	1202	R
1342	1972	1148	Ad
	1973	1202	R
1342.5	1972	1148	Ad
	1973	1202	R
1343	1972	1148	Ad
	1973	1202	R
1344	1972	1148	Ad
	1973	1202	R

Section	Affected by Year	Chapter	Effect
1345	1972	1148	Ad
	1973	1202	R
1346	1972	1148	Ad
	1973	1202	R
1347	1972	1148	Ad
	1973	1202	R
	1973	1204	Am[82]
1348	1972	1148	Ad
	1973	1202	R

*Effective immediately.

[461]In the event any other act or acts of the 1971 Regular Session have any effect on any section of any code or statute affected by this act, the provisions of such act or acts shall prevail over the conflicting provisions of this act.

[468]Operative on July 1, 1973.

CALIFORNIA STATS. 1973, CH. 1203, SECTIONS 3 AND 4, SUBCH. 3.

SEC. 3. Chapter 3 (commencing with Section 1500) of Division 2 of the Health and Safety Code is repealed.

SEC. 4. Chapter 3 (commencing with Section 1500) is added to Division 2 of the Health and Safety Code, to read:

CHAPTER 3. CALIFORNIA COMMUNITY CARE FACILITIES ACT

Article 1. General Provisions

1500. This chapter shall be known and may be cited as the California Community Care Facilities Act.

CALIFORNIA STATS. 1973 CH. 1202, SECTION 1

CHAPTER 1202

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, as added by Chapter 1148 of the Statutes of 1972, is repealed.

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

§ 1310. Persons, entities, and activities subject to license requirement.

No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1250 (a) AND (d)

§ 1250. Governing definitions.

As used in this chapter:

(a) "Facility" means any hospital, institution, boarding home or other place for the care of persons, homefinding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, mentally retarded persons and other incompetent persons.

(d) "Homefinding agencies" means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1508

§ 1508. Necessity of Licensure; temporary permit; county facilities

No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter.

No person, firm, partnership, association or corporation within the state shall provide specialized services within a community care facility in this state, without first obtaining a special permit therefor as provided in this chapter.

Except for a juvenile hall operated by a county, this section shall apply to community care facilities directly operated by a county. Each county operated community care facility shall comply with the standards established by the director for community care facilities.

CALIFORNIA HEALTH AND SAFETY CODE SECTION § 1502

§ 1502. Definitions

As used in this chapter, "community care facility" means any facility, place, or building which is maintained and operated to provide nonmedical residential care, day care, or homefinding agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, or incompetent persons, and includes the following:

(a) "Residential facility" means any family home, group care facility, or similar facility determined by the director, for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual.

(b) "Day care center" means any facility which provides nonmedical care to persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis.

(c) "Homefinding agency" means any individual or organization engaged in finding homes, or other places for placement of persons of any age for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1540

§ 1540. Violations of chapter or regulations; misdemeanor

Any person who violates any of the provisions of this chapter, or who willfully or repeatedly violates any rule or regulation promulgated under this chapter, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars ($500) or by imprisonment in the county jail for a period not to exceed 180 days, or by both such fine and imprisonment.

CALIFORNIA GOVERMENT CODE SECTION 9608

§ 9608. Termination or suspension of law creating offense. The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.